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In The

Supreme Court of the United States

October Term, 1975

No. 75-594

INTERCOUNTY CONSTRUCTION COMPANY,

Petitioner,

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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No.

INTERCOUNTY CONSTRUCTION COMPANY,

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vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Intercounty Construction Company, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 23, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at CCH 1974-1975 OSHD Par. 19,858, the decision rendered by the Occupational Safety and Health Review Commission is reported at 5 OSAHRC 782 (1973), CCH 1973-1974 OSHD Par. 17,044, and the decision of the Administrative Law Judge is reported at CCH 1971-1973 OSHD Par. 15,436.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1975. This petition for a writ of certiorari is filed within 90 days after that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether or not the Court below erred in interpreting the statutory meaning of a "willful" violation, thereby applying a standard unsupported by the Act when assessing the petitioner's conduct?

STATUTORY PROVISIONS INVOLVED

United States Code Annotated, Title 29

§666. Civil and Criminal penalties

(a) Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation.

STATEMENT OF THE CASE

Intercounty Construction Company is a contracting company which specializes in underground construction, *i.e.*, the installation of sewer mains, tunnels, culverts, highway

interchanges, and other work related to excavation. At the job site in question, the Company was installing a large interceptor sewer for the County of Arlington, Virginia on April 12, 1972. To install the pipe, a large trench was excavated to a depth of 10.7 feet and an average width of 17 feet at the top. The actual excavation was done with a back hoe, but it was necessary for trench laborers to do some fine grading and grade checks with hand tools; these men were also in the trench for the actual placing of the pipe.

On April 12, 1972, the Occupational Safety and Health Administration (OSHA) contacted the company regarding a report received by OSHA that laborers were working in an unshored trench at the Arlington, Virginia project. The Company's construction foreman testified that despite his belief that the trench was safe, at the instruction of the Company president a mule[1] was immediately placed in the trench. The mule remained in the trench on April 12, 1972, until the pipe being laid reached the vicinity of a concrete manhole. At this point in the construction, it was determined that because a bend in the ditch and the pipe was necessary, the mule could no longer be used. The foreman concluded the trench was safe without the mule, and that the mule could be removed, without disregarding either the law or the employees' safety. Once the mule was removed, another section of pipe was laid without incident; however, the record shows that one employee was inside the pipe and another employee on top of the pipe at the time the next section of pipe was laid. No further work was performed in the trench that day.

1. A mule is a portable steel shield used to protect laborers from a cave-in. This particular mule had dimensions of 20 feet in length, 8 feet in height, and 8 feet in width.

One witness testified at the hearing that the first task begun the next day, April 13, 1972, was the reinstallation of the mule. The employee who again phoned OSHA the morning of April 13, 1972, testified that when he left the project to report the mule's absence from the trench to OSHA, the mule was not installed, but when he returned from the telephone, the mule had been replaced in the trench. Furthermore, at the time the OSHA compliance officer inspected the project for possible OSHA violations, the mule had been reinstalled.

On April 28, 1972, the Secretary of Labor issued a citation for an alleged willful violation of the standard contained in 29 CFR §1926.652(c),[2] and a notification of a proposed penalty of $10,000 for the alleged willful violation. Citations issued at the same time for two serious violations and twenty-two non-serious violations are no longer at issue. Petitioner contested only the alleged willful violation and two items of the citation for non-serious violations.

On January 29, 1973, Administrative Law Judge Abraham Gold issued his decision vacating the contested portions of the citation for non-serious violations and affirming the citation for a willful violation and assessing a penalty of $10,000 therefore. In so ruling, the Administrative Law Judge held that despite petitioner's belief that the trench in question was in compliance

2. Section 1926.652. *Specific Trenching Requirements.* (c) Sides of trenches and hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above 5-ft. level may be sloped to preclude collapse, but shall not be steeper than 1-ft. rise to each ½-ft. horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the slope proportion.

with the Occupational Safety and Health Act of 1970 (Act), [Pub. L. 91-596, 84 Stat. 1590, 29 U.S.C. §651 *et seq.*], the temporary removal of the mule constituted a willful violation of section 5(a) of the Act. In reaching the determination that the violation was willful, the Administrative Law Judge defined willful ". . . as meaning an act committed intentionally, knowingly, or voluntarily as distinguished from accidentally, but [it] is susceptible to varying interpretations" (30a).[3] Significantly, the Administrative Law Judge went on to state that "when used in a statute calling for a civil penalty, it was interpreted as meaning *purposely* or *obstinately,* and as describing the attitude of a doer who, having a free will or choice, either disregards the statute or is plainly indifferent to its requirements" *Id.* (citations omitted) (emphasis supplied).

On December 19, 1973, the Occupational Safety and Health Review Commission (Commission) issued its decision affirming the Judge's finding of a willful violation but vacating the $10,000 penalty and substituting a penalty of $5,000. In affirming the Administrative Law Judge's decision, the Commission adopted the Judge's definition of a willful violation of the Act, except for that portion of the decision where the Administrative Law Judge noted that in a civil penalty setting "willful" had been "interpreted as meaning purposely or obstinately . . ." (12a).

On July 23, 1975, the United States Court of Appeals for the Fourth Circuit affirmed the Commission's decision regarding petitioner's alleged willful violation of the Act. After acknowledging the lack of statutory definition (2a, n.1), the Fourth Circuit affirmed the Commission's statutory construction of the term willful, stating:

3. References to the opinions below are designated by their appropriate Appendix page number, followed by "a."

> "We agree with the position adopted by the Commission in interpreting the statute that 'willful' means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, 'regardless of venial motive'" (5a). Citing *F. X. Messina Construction Corp. v. Occupational Safety and Health Review Commission*, 505 F.2d 701, 702 (1st Cir. 1974).

REASON FOR GRANTING THE WRIT

The Court below has incorrectly construed the statutory meaning of a willful violation, thereby creating a direct conflict of the Circuit Courts of Appeals.

Petitioner submits that the Court below has erroneously interpreted the meaning of "willful" under the Act and, in so doing, has applied the wrong standard in measuring the petitioner's conduct under the statute. It is significant, first of all, that the Fourth Circuit has relied on the precedent established in *F. X. Messina Construction Corp. v. Occupational Safety and Health Review Commission, supra.* In reaching a similar construction of the term willful, the First Circuit in *Messina* summarily concludes that an employer's belief that an act or omission is not in contravention of the Act is inconsequential if, in fact, the action or inaction is a technical violation of the law. To support this construction of willful, the

First Circuit in *Messina* eliminates any consideration of good faith or intent on behalf of an employer by stating that such considerations are precluded by the agency's regulations. In other words, according to the reasoning in *Messina*, whether or not a violation is willful under the Act cannot depend on the intent of an employer's actions because such consideration is removed by administrative fiat. It is clear, of course, that the First Circuit's analysis in *Messina* does not address the statutory construction necessary to resolve the issue presented in this case, and that the *Messina* decision's precedential value is limited by its presumption that the agency has correctly filled the statutory void already noted. Moreover, as discussed below, the Fair Labor Standards Act authority relied on by the First Circuit in *Messina* is not controlling in construing this Act's construction of willful.

Further indication that the Fourth Circuit has erroneously construed the statutory meaning of a willful violation under the Act is the Circuit Court's failure to properly determine the context in which the Act places a willful violation. As noted by the Third Circuit in *Frank Irey, Jr. Construction Co. v. Occupational Safety and Health Review Commission*, ——F.2d——, CCH 1974-1975 OSHD Par. 18,927 (3rd Cir. 1974), *aff'd on rehearing en banc*, ——F.2d——, CCH 1975-1976 OSHD Par. 19,878 (3rd Cir. 1975), "the meaning of willfulness changes with the context in which it appears." CCH 1974-1975 OSHD Par. 18,927 at p. 22,730. It follows, then, that the context of a willful OSHA violation can only be determined by examining the Act's express statutory scheme for penalty assessment. According to section 17 of the Act (29 U.S.C. §666), penalties increase in proportionate to the gravity of violations.

Thus, the Act defines a "serious" violation as one which requires proof of a substantial probability that death or serious harm can result from a condition "unless the employer did not, and could not with the exercise of reasonable diligence know of the presence of the violation." 29 U.S.C. §666(k); *Frank Irey, Jr., Construction Co. v. Occupational Safety and Health Review Commission, supra.* In other words, a conclusion that a violation is "serious" requires that the condition was hazardous and that the employer knew or should have known of the hazard.

Obviously, this definition is no more than a rephrasing of the definition of willful adopted by the Fourth Circuit below, and it leaves no room for the next gradation and most egregious of the penalties set forth in the Act. Therefore, by concluding that the term "willful" requires no motive, the Fourth Circuit has ignored the plain meaning of Congress that "willful" violations — which can draw penalties ten thousand times as great as "serious" violations — were designed to cover more flagrant types of conduct than "serious" violations. Because the employer's intent is the only variable which separates "serious" violations from "willful" violations under the Act, it is clear that an employer's intent or motive is controlling in assessing his conduct as willful under the Act.

Despite the obvious significance which intent or motive has in assessing an employer's alleged willful violation, the Circuit Court below has held that "[r]egardless of any good-faith belief that the work area remained safe the fact is that the company knowingly chose not to comply with the OSHA regulations and requirements. That decision was a willful action in violation of

the law" (5a). Like the First Circuit in *Messina, supra,* the Fourth Circuit has ignored the plain statutory meaning of a "willful" violation under the Occupational Safety and Health Act, and has instead given blind deference to the Secretary of Labor's regulations.

In contrast to the Fourth Circuit's deference to administrative regulations[4] the Third Circuit Court of Appeals in *Frank Irey, Jr. Construction Co. v. Occupational Safety and Health Review Commission, supra,* has carefully analyzed the statutory scheme of the Act. The decision in *Irey* notes, first of all, that where an employer has a reasonable basis to believe that an action or omission will not constitute a violation of the Act, the subsequent determination by the agency that a willful violation has occurred must be tempered by the employer's motive in performing the action. In other words, because of the graduated penalty scheme of the Act discussed above, the employer's motive or intent in performing the action must be considered in order to preserve the distinction between "serious" and "willful" violations of the statute. According to the well reasoned opinion in *Irey,* to do otherwise would remove the distinction between these two types of violations, which would produce a conflict with the statute's express language and intent. Having developed the statutory rationale discussed above, the Third Circuit concludes that "willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission — it

4. While administrative regulations are often entitled to "great deference," *Udall v. Tallman,* 380 U.S. 1, 16 (1965), they are not entitled to deference when they are clearly wrong. *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86 (1973).

involves an element of obstinate refusal to comply." CCH 1974-1975 OSHD Par. 18,927 at p. 22,730.

Petitioner strongly contends that in rejecting the Third Circuit's cogent analysis, not only has the Fourth Circuit failed to deal with the logical structure of OSHA violations as expressed in the Act, but the Court has overlooked that portion of the Administrative Law Judge's opinion in which he acknowledges prior interpretations of the term willful to include "purposely" and "obstinately," *supra.* Rather than deal with this significant interpretation, the Fourth Circuit has relied on inapposite authority. Specifically, the Court has placed heavy reliance on the decision in *Coleman v. Jiffy June Farms,* 458 F.2d 1139 (5th Cir. 1972), a decision involving the meaning of willful in the context of the Fair Labor Standards Act. 29 U.S.C. §201 *et seq.* Suffice it to say that the dissimilarities between the Fair Labor Standards Act and the Occupational Safety and Health Act are such that a definition of the term willful under the Fair Labor Standards Act *cannot* be determinative of the context in which willful arises in this litigation.

Finally, the Fourth Circuit attempts to dispose of the Third Circuit's construction of willful by reference to the following quote from this Court:

> "[W]e are persuaded that it [willfully] means purposely or obstinately and is designed to describe the attitude of a [person], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its

requirements" (7a). Citing *United States v. Illinois Central Railroad*, 303 U.S. 239, 243 (1938).

In light of this Court's own definition of willful as including "purposely or obstinately," and in light of the Third Circuit's reliance on *Illinois Central Railroad, supra,* in support of the *Irey* decision, *supra,* petitioner submits that the Fourth Circuit's rejection of the *Irey* rationale regarding the meaning of willfulness was in error.

CONCLUSION

Wherefore, for the reasons set forth above, it is submitted that the instant case presents a significant yet unresolved question under the Occupational Safety and Health Act. Accordingly, it is urged that a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

s/ Robert T. Thompson

s/Guy F. Driver, Jr.

s/ Gardner G. Courson

THOMPSON, OGLETREE
AND DEAKINS
Counsel for Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1172

Intercounty Construction Company,

Petitioner,

versus

Occupational Safety and Health Review Commission,

Respondent.

On Petition for Review of an Order of the Occupational Safety and Health Review Commission

Argued December 5, 1974. Decided July 23, 1975

Before BOREMAN, Senior Circuit Judge, and FIELD and WIDENER, Circuit Judges

Guy F. Driver, Jr., (Robert T. Thompson; Melvin Hutson; Thompson, Ogletree and Deakins on brief) for Petitioner; Harry R. Silver, Attorney, United States Department of Justice, (Carla

A. Hills, Assistant Attorney General, William J. Kilberg, Solicitor of Labor, Benjamin W. Mintz, Associate Solicitor for Occupational Safety and Health, Michael H. Levin, Stephen C. Yohay, William S. Cumings, Stanton R. Koppel, Attorneys, United States Department of Justice, on brief) for Respondent.

BOREMAN, Senior Circuit Judge:

Intercounty Construction Company (company) appeals from a decision of the Occupational Safety and Health Review Commission (Commission) which found that the company committed a "willful" violation[1] of the employment safety provisions of section 5(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §654(a) as defined by regulation promulgated by the Secretary of Labor pursuant to section 6 of the Act, 29 U.S.C. §655, which regulation is set forth in 29 C.F.R. §1926.652(c).[2] The company was cited for the violation after two telephoned reports of violations of safety standards

1. 29 U.S.C. §666 provides different penalties for various types of violations ranging from nonserious, serious, willful, and to a willful violation which causes death. A willful violation may be penalized by a civil fine of not more than $10,000. The statute does not define "willful."

2. 29 C.F.R. §1926.652(c) provides:

> Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring the sides of the trench above the 5-foot level may be sloped to preclude a collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal. When the outside diameter of a pipe is greater than 6-feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

prompted an inspection of the company's job site by two regional officers of the Occupational Safety and Health Administration (OSHA) on April 13, 1972. The citation ordered abatement of the hazard and levied a $10,000 fine, a civil penalty. The company protested the citation and the Secretary of Labor issued a formal complaint. A trial was had before an Administrative Law Judge who sustained the citation on January 30, 1973. That decision was reviewed by the full Commission which entered an opinion on December 26, 1973, affirming the finding that the company had committed a willful violation but reducing the fine to $5,000.00.

The facts of the violation were that the company was engaged in laying a large sewer pipe for the County of Arlington, Virginia; the pipe was placed in a trench 10.7 feet deep and 17 feet wide; the trench was not braced, shored, or sloped to prevent cave-ins as required by the regulation; a laborer at the job site informed OSHA of this violation by telephone on April 12, 1972; OSHA informally contacted the company urging abatement of the hazard; in response, the company placed a protective device known as a "mule"[3] in the trench; the "mule" was removed before work was completed on April 12; the same laborer again informed OSHA of work being undertaken in the trench without the "mule" or other protective devices on April 13; OSHA then sent two inspectors to the job site and their report led to the contested citation.

The evidence presented to the Administrative Law Judge was conflicting as to whether work was performed in the ditch

3. A mule is a portable steel shield used to protect laborers from a cave-in. This particular mule had dimensions of 20 feet in length, 8 feet in height, and 8 feet in width.

after removal of the "mule" on the afternoon of April 12, and as to whether other means of protection obviated the need for additional protective devices as to that work, *if* any work was undertaken in the ditch. In essence, the company contended that even if workers were in the trench, the presence of a concrete manhole provided sufficient shoring on one side while the other side was properly sloped so that the company was substantially in compliance with the safety regulation or, at least, the company had a good-faith basis for believing that it had met the requirements. However, the inspectors in their report found it to be implausible that *no* work was undertaken in the trench after removal of the mule, and they discounted the safety value of the manhole while attributing any claimed sloping of the trench walls in the work area to be the result of a cave-in. The Administrative Law Judge resolved these conflicts in favor of the inspectors and further determined that the conduct of the company was flagrant rather than a good-faith effort to comply. His resolution of the matter was affirmed by the full Commission and, while the Commission agreed that the violation was willful, it declined to characterize the Company's acts as flagrant and reduced the penalty. This appeal followed.

The company again urges that the record contains no substantial evidence to support a finding that workmen were in an unprotected area after the mule was removed, arguing that there was no indication that workers were actually in the ditch, and that the area was, in any event, protected. The company further contends that the decisions of the Administrative Law Judge and of the full Commission do not meet the requirements of findings of fact as set forth in the Administrative Procedure

Act, 5 U.S.C. §557. Finally, the company contends that, *if* a violation did occur the finding that it was willfully committed is arbitrary, capricious, and contrary to established law in light of the good-faith belief held by the job foreman that the area was safe. We find these contentions to be without merit and affirm the decision of the Commission.

Only one of these issues requires extended discussion. When faced with a problem of statutory construction we accord great deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965), *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 131 (1944). We agree with the position adopted by the Commission in interpreting the statute that "willful" means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, "regardless of venial motive." *F.X. Messina Construction Corp. v. Occupational Safety and Health Review Commission*, 505 F.2d 701, 702 (1 Cir. 1974). The facts here indicate such a conscious, deliberate decision. After the company was advised by OSHA that protective measures were necessary and had placed the "mule" in the trench to achieve compliance it intentionally removed the "mule" from the trench. Regardless of any good-faith belief that the work area remained safe the fact is that the company knowingly chose not to comply with the OSHA regulations and requirements. That decision was a willful action in violation of the law.

In reaching this conclusion we are not unmindful of the holding of the Third Circuit which found willfulness, in this statute, as connoting the element of "obstinate refusal to comply." *Irey v. Occupational Safety and Health Review Commission*, No. 73-1765 (3 Cir. Nov. 4, 1974). However, we decline to require the Commission to find such a bad purpose before it sustains a citation for a willful violation. To require bad intent would place a severe restriction on the statutory authority of OSHA to apply the stronger sanctions in enforcing the law, a result we do not feel was intended by Congress. Rather, we agree with the Commission that willfulness is used in the mere cognitive sense in civil statutes, and connotes bad purpose only when an element of a criminal act. *United States v. Murdock*, 290 U.S. 389, 394 (1933), *Yarborough v. United States*, 230 F.2d 56, 61 (4 Cir. 1956). Therefore, to the extent that *Irey, supra*, requires a finding of bad purpose in order to justify the imposition of civil penalties for a willful violation, we are not inclined to follow that decision.

Our result is supported by the definition of willful utilized in the context of other civil penalties. It has been held, in a civil action enforcing the FLSA, that an employer's conduct is willful when there is substantial evidence to support a finding that the employer *knew* that his actions might violate the law. *Coleman v. Jiffy June Farms*, 458 F.2d 1139, 1142 (5 Cir. 1972). In this instance, the company *knew* that the removal of the "mule" would violate the regulation. Thus, it acted willfully as that word is defined for purposes of civil actions.

The application of the civil definition of willful also follows logically from the requirements of the Occupational Safety and

Health Act. In the section concerning the duties of employers and employees, it is provided that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter." 29 U.S.C. §654(a)(2). The penalty to be imposed here is to be applied against "[a]ny employer who willfully or repeatedly violates the requirements of section 654 . . ." 29 U.S.C. §666(a). That the company violated the requirements of §654 by failing to discharge its duty to comply with a safety standard promulgated under the Act is clear. The question, whether the company "willfully" did so within the meaning of §666 would seem to have been answered by the Supreme Court.

> [W]e are persuaded that it [willfully] means purposely or obstinately and is designed to describe the attitude of a [person], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *United States v. Illinois Central Railroad,* 303 U.S. 239, 243 (1938).

We conclude that when §666 penalizes an employer who willfully violates the requirements of §654, Congress intended to punish the conduct of one who "intentionally disregards the statute or is plainly indifferent to its requirements," or, to punish the conduct of one who *knew* that his actions might violate the law. *Coleman v. Jiffy June Farms, supra.*

That the company, when it violated the prescribed standard after a warning from OSHA, acted with indifference to the law

and *knew* that it was violating a safety standard is also clear. The company's conduct here properly is characterized as willful within the meaning of 29 U.S.C. §666(a). Having determined that the Commission has correctly defined the word "willful" as used in the statute and that the conduct of the company comes within that definition on the facts in this case, we affirm the decision of the Commission.

Affirmed.

DECISION OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

INTERCOUNTY CONSTRUCTION CORPORATION,

Respondent,

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, Local 456

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 77,

Employee Representatives.

OSAHRC DOCKET NO. 919

Before: MORAN, Chairman; CLEARY, Commissioner.

MORAN, Chairman: On January 30, 1973, Review Commission Judge Abraham Gold issued a decision in this case

holding that respondent had violated section 5(a) (2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*, 84 Stat. 1590, hereinafter referred to as the Act) for failure to comply with the occupational safety and health standard published as 29 C.F.R. 1926.652(c), and that the violation was willful. He assessed a penalty of $10,000[1], the maximum amount authorized for such an offense pursuant to section 17(a) of the Act. Thereafter, pursuant to section 12(j) of the Act, I directed that the decision be reviewed by the Commission.

The Commission has reviewed the record in this case, including the brief filed by complainant. Respondent submitted no brief. On the basis of such review, the Commission affirms the Judge's order with regard to the violation but finds that the $10,000 penalty assessed therefor is inappropriate.

The occupational safety and health standard at issue in this case requires that trenches exceeding five feet in depth be sloped to an angle of repose or, alternatively, shored, sheeted, braced or otherwise protected to guard against injuries from cave-ins.

Substantial evidence in the record established the following pertinent facts: On April 12 and 13, 1972, respondent had employees at work at a place of employment which consisted of a trench approximately 40 feet long and 10 feet deep. During

1. Two other alleged violations were found by the Judge not to have been established by the evidence. The Judge's decision with respect to those two alleged violations is hereby affirmed.

that two-day period, six different employees of the respondent were at one time or another working in the trench.

The trench was not sloped to an angle of repose. No shoring, sheeting, or bracing was installed in the trench. However, a portable protective device known as a "mule"[2] was used at least intermittently on each day so that for at least a part of each day employees working in the trench were protected against the danger of a cave-in. Out of a total of approximately 16 hours covered by the eight-hour work shift on each day that men were working in the trench, the mule was out of the trench for approximately five hours.

It appears from the evidence that not more than two workers were ever exposed at one time to the hazard resulting from the failure to comply with the cited standard.

There was evidence that part of one side of the trench was bordered by a solid concrete structure on the east bank which protected a part of the trench from caving in. Although not all of the trench walls were sloped, one portion of one wall appeared from the exhibits to be sloped.

For at least a part of the time that the mule was not being used in the trench, the reason was that, because of a manhole in the trench and because of the configuration of the trench at one

2. A portable steel trench shield, with internal dimensions of 20 feet in length, eight feet in height and approximately eight feet in width.

point, it was not always possible to move the mule along the trench.

On April 12, respondent's foreman was apprised that the trench did not comply with the applicable occupational safety and health standard and that without the mule being used in the trench, adequate precaution for employees' safety was not being taken. Notwithstanding that knowledge, he authorized removal of the mule for intermittent periods on April 12 and 13.

On the basis of the above facts, the Judge correctly found that respondent did not comply with the occupational safety and health standard requiring shoring, sloping, sheeting, bracing or otherwise protecting against injury from cave-ins and was, therefore, in violation of section 5(a) (2) of the Act.

Judge Gold relied on numerous cases to define a "willful" violation. The Commission agrees that, in the context of this Act, a "willful" violation is properly defined as an act or omission which occurs consciously, intentionally, deliberately or voluntarily as distinguished from accidentally. The evidence in this case establishes that respondent did fail to comply with the appropriate standard consciously and voluntarily, as distinguished from accidentally, even though such failure appears from the evidence to have been motivated in part from a subjective feeling of necessity by respondent's foreman, as the result of the configuration of both the trench and the pipe being

laid, as well as the method which had been chosen to effect compliance with the standard.[3]

Although respondent's violation was willful, we cannot agree with the Judge's statements that the violation was "flagrant" and that respondent "purposely" disregarded the requirements of the standard. Those terms tend to indicate a malicious disregard of the standard rather than a willful or conscious (as opposed to an accidental) failure to comply therewith.

Having determined that the evidence supports the finding of a willful violation, the Commission turns now to the appropriateness of the penalty assessed.

Section 17(j) of the Act requires the Commission to assess all penalties only after giving due consideration to the four statutory factors of size, history of prior violation, good faith, and gravity of the violation. The Commission is not free in any case to ignore any of the four factors, although the factors need not be accorded equal weight.[4]

In a case involving a willful violation, no weight ought to be allowed for good faith because by definition a willful violation

3. The removal of the mule on the instances that it was removed was done either because of the configuration of the trench or because the obstruction of a manhole made it impossible to lay a part of the pipe with the mule in the trench.

4. *Secretary of Labor v. National Realty and Construction Company*, OSAHRC Docket No. 85, decided September 6, 1972.

connotes a violation which is committed notwithstanding knowledge that it is a violation. The penalty-assessment criteria: "size of the business of the employer being charged" was inserted into this Act to protect small employers against penalties out of proportion to the amount of business they do. This employer is a large business enterprise. Only the criteria "history of previous violations" and "the gravity of the violation" are deserving of any weight in assessing an appropriate penalty in this case.

The record established that the respondent had no prior violations under the Act. It also shows that considerable sums of money was spent on safety equipment by respondent who maintained an existing safety program for training its employees.

With regard to gravity, the Commission notes that the Judge did not discuss, and apparently did not consider, any of the elements which the Commission set forth in *Secretary of Labor v. Broadview Construction Co.*[5] as being critical whenever determining the gravity of a given violation. In *Broadview*, we held that the following elements must be considered: (1) number of employees exposed to the risk of injury; (2) the duration of the exposure; (3) the precautions taken against injury; and (4) the degree of probability of the occurrence of any injury. The decision below contained no discussion of these elements in reaching the conclusion that "the instant violation is of a high level of gravity." That decision also

5. OSAHRC Docket No. 124, decided January 10, 1973.

concluded without discussion of any of these elements that the violation is "obviously serious in nature, there being a substantial probability that death or serious physical harm could result from a cave-in . . . . "

Although no situation where an employee's life is endangered — even momentarily — can be taken lightly, Congress provided for a range in penalties from $1 to $10,000 to be assessed against employers found to be in willful violation of this Act. It would be an abuse of the discretion placed in this Commission therefore if the maximum permissible penalty were to be assessed each time a willful violation is established. Reasons persuading us against the maximum penalty in this case are many.

The evidence indicates that only two employees were exposed at any one time to the risk of cave-in and that such exposure was intermittent, covering a total of not more than 4 to 5 hours during a two-day period of time. The evidence also discloses that a part of the trench was protected against cave-in by a concrete wall and that for a majority of the working time during the two days over which the violation existed, the respondent took precautions against injury due to cave-in by using a mule which qualifies as a means of protection within the language of the standard.

Although the nonoccurrence of an accident is not conclusive evidence that the probability of an accident occurring was low, the fact that a violation existed intermittently for a

period of two days without incident is some evidence that the degree of probability was not so high as to become an overriding consideration.

Considering that (1) the number of employees exposed to the risk of injury was small; (2) the duration of their exposure was short; (3) the exposure was intermittent; and (4) partial precautions (use of a mule in the trench) were taken to reduce the risk of injury, the probability that an accident resulting in injury would occur was significantly reduced. Based upon all of the above facts the commission finds that although the gravity of the violation is substantially more than minimal, it is not of such a severe nature as to require the highest possible penalty. When this fact is coupled with this employer's absence of previous violations and the other circumstances discussed above, it is concluded that an appropriate penalty in this case would be $5,000.

Pursuant to the foregoing, the Commission affirms the Judge's finding that respondent was guilty of a willful violation of section 5(a) (2) of the Act, but vacates the $10,000 penalty assessed by the Judge and substitutes an assessed penalty of $5,000.

FOR THE COMMISSION

s/ William S. McLaughlin
William S. McLaughlin
Executive Secretary

Dated: December 19, 1973

Decision of the Occupational Safety and Health Review Commission

OSCHRC DOCKET NO. 919

CONCURRING OPINION

CLEARY, Commissioner, CONCURRING:

In *Secretary of Labor v. Frank Irey, Jr., Inc.*, OSHRC Docket No. 701 (August 1, 1973), the Commission assessed a penalty of $5,000 for a wilful violation of the Act for failure to comply with the trenching standard. Consistent with that decision, I concur in the result reached here by Chairman Moran.

DECISION AND ORDER OF ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

INTERCOUNTY CONSTRUCTION CORPORATION,

Respondent.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, Local 456

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 77,

Authorized Employee Representatives

APPEARANCES: James M. Conlin, Jr., Esquire,
for the Department of Labor
Ronald G. Ingham, Esquire,
for Respondent

Decision and Order of Administrative Judge

This action arose under Section 10(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590 *et seq.;* 29 USC 651 *et seq.)* and came on for hearing on November 9-10, 1972, at Washington, D.C.

On April 28, 1972, pursuant to Section 9(a) of the Act, Complainant issued a citation for a willful violation, two citations for a total of two serious violations, and a citation alleging 22 non-serious violations.

A Notification of Proposed Penalty was issued on April 28, 1972. A total penalty of $12,640 was proposed by Complainant. Respondent has contested only the alleged willful violation and items 2 and 22 of the citation for nonserious violations. Under Section 10(a) of the Act all other items in the citations and the penalties proposed therefor became a final order of the Review Commission upon the expiration of 15 working days from the date on which Respondent received the Notification of Proposed Penalty.

The contested items in the Citations, as amended by the Complaint, charge Respondent with violating the following standards contained in 29 CFR:

(Willful)

§1926.652 Specific trenching requirements.

(c) Sides of trenches in hard or compact soil, including embankments, shall be shored or

otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

(Item 2)

§1926.651 Specific excavation requirements.

(i)(1) In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

(Item 22)

§1904.2 Log of occupational injuries and illnesses.

Each employer subject to the act shall maintain in each establishment, a log of occupational injuries and illnesses. Each employer shall record on the log each recordable occupational injury and illness within 2 working days after receiving information that a recordable case has occurred.

> Occupational Safety and Health Administration Form OSHA No. 100[1] shall be used for this purpose and shall be completed in the form and detail provided for in the form and the instructions contained therein. The log may be maintained in another manner if approved in accordance with the provisions of §1904.13.

A penalty of $10,000 was proposed for the alleged willful violation of 29 CFR 1926.652, $65 for item 2 and $100 for item 22.

Section 5(a)(2) of the Act requires that each employer comply with occupational safety and health standards promulgated under the Act.

Under Section 17(c) of the Act, a civil penalty of up to $1,000 may be assessed for a nonserious violation. Section 17(a) provides that a penalty of up to $10,000 may be assessed for each willful or repeated violation. Section 17(j) declares that the Review Commission shall have authority to assess all civil penalties after giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.

In the Answer to the Complaint, Respondent conceded that the Occupational Safety and Health Review Commission has

1. Filed as part of the original document.

jurisdiction over this proceeding pursuant to Section 10(c) of the Act. Respondent's Answer also admitted that it is a corporation authorized to do business in Virginia with its principal office and place of business located at Hyattsville, Maryland; that it is engaged in general construction work; that at all times herein pertinent it was engaged in the installation of a sewer line at the intersection of Eads Road and Fort Scott Drive, Alexandria, Virginia; that many of the materials and supplies used by Respondent and its employees at this worksite were received directly from outside Virginia and accordingly, Respondent was and is an employer engaged in a business affecting commerce, within the meaning of Sections 3(3) and 3(5) of the Act.

Respondent is a contracting organization specializing in underground construction, such as installation of water mains and sewer mains (Tr. 198), and is installing a large interceptor sewer system for Arlington County, Virginia, at the aforesaid job site. The inside diameter of the sewer pipe is 66 inches, and the outside diameter about 78 inches (Tr. 198).

There are three excavations at the site. The first and longest is about two blocks long, located south of the office trailer; the second is a "squeeze-box" excavation north of the trailer; and the third is north of that (Tr. 175-176). Respondent has 30-40 employees at the site on this $1 million project (Tr. 222-223).

Nonserious item #2 relates to the first excavation; the willful violation charge involves the third trench.

An inspection of the site was conducted by the Area Director and a Compliance Officer on April 13, 1972, after an

employee of Respondent had complained by telephone to the Occupational Safety and Health Administration on the morning of April 12 and again on the morning of April 13 (Tr. 29, 173).

Nonserious item #2 will be considered first. Area Director Lapsley Ewing testified that during the inspection he observed large amounts of spoil pile extending right to the edge of the first excavation (Tr. 40-44, Exhs. C-2, C-3, C-4). Compliance Officer William Corrigan testified that he saw dirt piled closer than 2 feet from the edge of that trench in several areas (Tr. 176). The Project Manager of the job, Kenneth Crumrine, said that rain runs into the trench, so he had directed the foreman to leave a small quantity of dirt along the edge of the trench to serve as a dike to keep the water from running into the trench (Tr. 208-209, Exh. C-3), but that Joy Construction Company, which operated under a contract with the telephone company, had placed the large pile of spoil at the edge of that trench (Tr. 224); that he observed some of that material being placed there by one of Joy's cranes only a few days prior to April 13 (Tr. 225, 229, 230). It was his testimony that Respondent completed the excavation on the Friday prior to April 13 (Tr. 209), turning it over to Joy at that point, with Respondent's employees leaving that area (Tr. 230) on Friday (April 7).

According to Mr. Crumrine, Respondent's employees were to return to work in that trench only after the telephone repairs were completed (Tr. 209), it being the job of Respondent to refill the area after the telephone company's work was done. He asserted that before turning the trench over to Joy, Respondent

had loaded on its trucks all the dirt excavated from the trench and hauled it to a stockpile behind its trailer (Tr. 225-226).

As to the small amount of dirt along the edge of this trench, admittedly placed there by Respondent, this does not per se suffice to lead to a finding of a violation of the standard in issue. Insofar as the large spoil pile is concerned, this record falls short of establishing that the violation was created by Respondent, or that Respondent's employees were exposed to the violative condition.

We turn next to item #22. The Compliance Officer testified that on April 13, 1972, he inquired of Mr. Ellis (Respondent's Construction Safety Officer) and Mr. Gregorio (Construction Foreman) as to the whereabouts of OSHA Form 100, Log of Occupational Injuries and Illnesses (Tr. 179), and Mr. Ellis said that he figured it was at the main office at Hyattsville (Tr. 179-180). The Area Director said that Mr. Ellis told him that it should have been at the site because he had brought it there sometime ago (Tr. 63). In his testimony, Mr. Crumrine related that the trailer at the site had been broken into during the weekend before the inspection; that glass was broken out of both ends of the trailer, and the doors sprung; that the telephone was torn from the wall; that the files were in disarray; that since confidential cost records and the job diary were kept there, he removed the manila folder to Respondent's adjacent job office about half a mile away (Tr. 207-208); that the folder contained that log, and he would have left it at the job site if he had noticed that it was among the contents (Tr. 207).

The telephone service had been restored and arrangements made for a glass company to replace the broken windows, but as of April 13 the glass had not been installed (Tr. 208). The log contained no entries (Tr. 207). There had been no injuries at the site (Tr. 264). The Area Director and Compliance Officer were told by Mr. Ellis on April 13 that the trailer had been broken into (Tr. 266).

Since the log had been removed unintentionally and temporarily from the trailer at the job site solely because the trailer had been vandalized, and there is no evidence that there were any recordable injuries or illnesses, a finding of a violation of the relevant standard is not justified.

This brings us to the remaining charge, that of a willful violation. This entire matter springs from the complaint of one Michael Burch, who was employed by Respondent as a truck crane oiler. His testimony was that on April 12, 1972, two laborers of Respondent were working at the bottom of the third trench, which was cut vertically, with no shoring whatever (Tr. 108); that he had seen the cut in that section of the trench made with a backhoe[2] (Tr. 110); that at about 9:00 or 9:15 a.m. he went to a public telephone and notified the Occupational Safety and Health Administration (OSHA) of the foregoing (Tr. 110); that a mule[3] was put into the trench at around 11:00 a.m. that

2. An excavating machine in which the bucket is rigidly attached to a hinged stick on the boom and is drawn toward the machine in operation. Webster's Third New International Dictionary, Unabridged.

3. A portable steel trench shield, with internal dimensions of 20 feet in length, 8 feet in height, and approximately 8 feet in width (Tr. 206).

day (Tr. 111), after which the laborers worked within the confines of the mule (Tr. 112); that the mule was lifted out of the trench by a backhoe at about 2 o'clock and the men were back at work in the trench until quitting time around 4 o'clock (Tr. 115-116); that it rained all that night and during the next morning, resulting in some water accumulating at the bottom of the trench and some small dirt slides, with mud piling up around the base of the pipe (Tr. 124).

He went on to say that on the morning of April 13 two laborers were in the trench shovelling muck away from the base and mouth of the pipe (Tr. 124-125); that he then made his second telephone call to OSHA, leaving the job site for 25-30 minutes (Tr. 126), and when he returned, the mule was back in the trench (Tr. 127). He placed the time of this call at 9:00 or 9:30 a.m. (Tr. 133).

Mr. Burch said that the walls of this trench were vertical except for the back, which was terraced in step fashion, with the height of each step about 4 to 4-½ feet (Tr. 151).

The Compliance Officer described the trench as consisting of hard, compact soil (Tr. 177), with an overall length of 35-40 feet (Tr. 178). He further stated that looking down toward the mule he observed the cut to be vertical, but not exactly so, because as the backhoe would pull out, going from north to south, it would not make an exactly vertical cut on the end of the trench (Tr. 177-178), but he saw no sloping of the walls and no adequate bracing (Tr. 178); that he did see 3-4 braces in the trench (Tr. 178-179).

The Area Director also said that this trench consisted of hard, compact soil (Tr. 58), and he asserted that the walls were unsloped (Tr. 60). He felt that the walls were vertically configurated for the most part, with a portion at the north end angled to a point, which appeared to him to be the result of slough or slide (Tr. 60).

According to Compliance Officer Corrigan, Mr. Gregorio, the foreman, told him that it was almost impossible to put the trench box (mule) into the excavation because of a bend in the pipe and a slight bend in the trench (Tr. 180); and Mr. Gregorio admitted that men worked in that trench on the 12th without the trench box, but denied that they did so on the 13th. He (Mr. Corrigan) opined that after removal of the mule, the work could have been performed without violating safety standards if there had been shoring, bracing, or sloping of the trench (Tr. 181).

Project Manager Crumrine, who was not at the site on April 12 or 13 (Tr. 200) because he was attending an arbitration meeting at Hyattsville, testified that the job plan was to slope the banks (Tr. 205). The construction foreman, Americo Gregorio, said that the banks were sloped one-half to one, but admitted that he made no measurement (Tr. 297-298). However, the construction safety officer of Respondent, Peter Ellis, testified that he thought that the site was safe because the west bank had adequate slope and there was a solid concrete structure on the east bank to protect the area (Tr. 267).

Mr. Crumrine said that the depth of the cut at the point of the first section of pipe was 10.7 feet (Tr. 217).

Area Director Ewing took photographs during the inspection (Tr. 106). One portion of one wall of the third trench does appear to be sloped (Exh. C-10), but clearly there is no sloping of the opposite wall (Exhs. C-8, C-9). Some of the photographs presented by the Government were taken from angles which leave something to the imagination.

In his testimony, foreman Gregorio said that on April 12 at 11 or 11:30 a.m. he received a telephone call from the corporation President who informed him that OSHA had telephoned that there was a ditch 25 feet deep with no mule and no protection for the men; that the President directed that he put a mule in the third trench, and he did so (Tr. 273-274); that the first section of pipe had been laid, and gravel was put down to a height of 15 inches above the invert (bottom on the inside) of the pipe (Tr. 276); that the mule was pulled ahead by a shovel (Tr. 276); that there was no way to move the mule along the trench and still bring the next section of pipe into line, because there was a manhole on the right side of the trench (Tr. 278); that he just pulled the mule out and set it on the back of the shovel (Tr. 278).

The foreman testified that it is common practice for pipelayers to get inside a pipe being laid in a trench, and wait for the next section of pipe (Tr. 277); that his pipefitters, while inside the first pipe, reached out and lubricated the edges of the concrete pipe with a vegetable soap, then installed a rubber gasket or ring on the end; that one of the men got out on the gravel bed, and while standing next to the pipe, directed the shovel operator to move the pipe to join the other section of

pipe, meanwhile guiding the pipe into position (Tr. 278-280). The foreman admitted that he entered the trench on April 12 (Tr. 280). As to April 13, he declared that the mule was put into the trench sometime between starting time (7:30 a.m.) and 8:15 a.m. (Tr. 281), an operation which he claimed took a few minutes; that he thought that on April 13 he saw laborers on the gravel in the trench, cleaning the dirt on top of the gravel, but was not positive (Tr. 282-283); that he got down into the trench on April 13 near the first section of pipe, and did not consider that trench to be unsafe (Tr. 283).

At one point foreman Gregorio testified that at 4:00 to 4:15 p.m. on April 13 a "nightcap" was placed on the pipe (Exh. C-8); that two men put it on; that one man, Mr. Peay, was on top of the ditch and handed down 3-inch boards, about 6-1/2 to 7 feet long, to another worker, Mr. Sanders, who was on top of the first section of pipe; that Mr. Sanders stood the boards up in front of the pipe (Tr. 290-291). This story that a worker put a nightcap on the pipe from a position atop the pipe, and not while standing in the trench, is implausible.

The testimony of witnesses Burch and Gregorio supports a finding that employees of Respondent worked in the trench at a depth of more than 5 feet on April 12 and 13, 1972, during periods when the mule was not in the trench. Respondent's Counsel contends in his brief (p. 27) that the employees in the trench were safe from harm because they worked within the pipe or in extremely close proximity to a formidable manhole. The weight of the evidence shows that the forman and laborers were in the trench itself on both days. In the event of a cave-in, escape

into the pipe or manhole would be highly unlikely. Any suggestion that enough dirt from a cave-in might flow into the open pipe or manhole to enable the trapped worker to reach safety is also less then meritorious.

Considering the record in its entirety, it is found that Respondent did not comply with the safety requirement of shoring, sloping, bracing, or otherwise supporting the sides of a hard or compact trench more than 5 feet deep and 8 or more feet long, while its employees were working in said trench on April 12 and 13, 1972. Hence, a violation of 29 CFR 1926.652(c) is established.

The next issue is whether the violation was willful. The term "willful" has been defined as meaning an act committed intentionally, knowingly, or voluntarily as distinguished from accidentally, but is susceptible to varying interpretations. It may mean one thing in civil matters and quite another in criminal prosecutions. When used in the latter, generally it has been construed to mean an act done with evil motive, bad purpose, or corrupt design. *United States v. Murdock,* 290 U.S. 389, 54 S. Ct. 223 (1933). *Wilson v. United States,* 250 F.2d 312, 319 (9 Cir. 1957). When used in a statute calling for a civil penalty, it was interpreted as meaning purposely or obstinately, and as describing the attitude of a doer who, having a free will or choice, either disregards the statute or is plainly indifferent to its requirements. *United States v. Illinois Central R. Co.,* 303 U.S. 239, 58 S.Ct. 533 (1938). In *Levy v. United States,* 140 F. Supp. 834, 836 (D.C. W.D. La. 1956), which involved a suit to recover from the Government the amount of a civil penalty assessed

against plaintiff for failure to pay social security and withholding taxes, the Court noted that the term has been interpreted to mean consciously, intentionally, deliberately, or voluntarily as distinguished from accidentally.

In the instant case, Respondent's construction safety officer attended classes on safety, conducted such classes for all of Respondent's supervisors and employees, and distributed the Department of Labor safety and health regulations to Respondent's superintendents (Tr. 241, 245, 248, 249, 250, Exhs. R-4-11). Despite all this exposure to safety information, and the fact that the job plan called for sloping of the walls of the trench in question, the walls were not sloped, and only some minor, inadequate bracing was installed. A mule was at the site, but it was not until an employee complaint reached OSHA that the mule was placed in the excavation. Employees worked in the trench on April 12, and again on the following day, in violation of the standards; violating the safety requirement on April 12 was bad enough, but repeating it on April 13 cannot be regarded as other than flagrant.

The foreman, acting as management, knew that the walls had to be sloped, shored, or otherwise supported; a mule was at the site for this reason. He testified that the job plan was to slope the walls (Tr. 297); at one point in his testimony he would have us believe that the sloping was indeed performed (Tr. 298), despite photographic evidence to the contrary, and the testimony of the Safety Officer who claimed only that one side of the trench had adequate slope and there was a solid concrete structure on the other side to protect a man standing in the area (Tr. 267).

Decision and Order of Administrative Judge

This record established that Respondent, acting through its construction foreman, knowingly and purposely violated the standard at 29 CFR 1926.652(c), intentionally disregarding its requirements.

A penalty of $10,000 has been proposed by OSHA. The foreman supervised about 9 men at the site (Tr. 299); Respondent has 30-40 employees at the site (Tr. 222-223), and an annual gross revenue of about $18-$20 million (Tr. 268). The record does not disclose any previous violations. The instant violation is of a high level of gravity. It is obviously serious in nature, there being a substantial probability that death or serious physical harm could result from a cave-in, and Respondent knew of the presence of the violative condition. On the question of good faith, we have evidence that the Corporation President told the Safety Officer to purchase whatever is needed for safety purposes; over $200,000 was spent (Tr. 244-245); and a safety education program was undertaken; but there has been a lack of adherence to safety standards nevertheless. In addition to the three contested items, OSHA issued citations on April 28, 1972, for 2 serious violations and 20 nonserious items which were not contested by Respondent. Clearly, Respondent had failed to require its supervisors to comply with safety standards.

Taking into account the size of Respondent's business, the gravity of the violation, good faith of Respondent, and history of previous violations, it is determined that a penalty of $10,000 is appropriate for this willful violation.

Counsel for Respondent moved to strike from the Complaint all allegations and references to citation items and proposed penalties which were not the subject of a timely notice of contest. The motion was granted at the hearing. Respondent's Counsel also has moved for certain amendments to the transcript of hearing. Said motion is hereby granted.

FINDINGS OF FACT

1. Respondent is a corporation authorized to do business in Virginia, with its principal office and place of business at Hyattsville, Maryland; it is engaged in general construction work and at all times pertinent herein was engaged in the installation of a sewer line at Eads Road and Fort Scott Drive, Alexandria, under a contract with Arlington County, Virginia.

2. Many of the materials and supplies used by Respondent and its employees at said worksite were received directly from outside Virginia.

3. A substantial amount of excavated material was stored less than 2 feet from the edge of an excavation at said worksite, but this condition was not created by Respondent, nor were its employees exposed to the violation; said condition was caused by another construction firm at a time when it was in control of the trench, operating under a separate contract with a public utility; a very small amount of spoil left by Respondent within 2 feet of the edge of this excavation was not of such significance as to amount to a safety violation.

4. OSHA Form 100, Log of Occupational Injuries and Illnesses, was not maintained at the worksite on April 13, 1972, because the trailer in which it had been kept was vandalized during the previous weekend and the log was removed unintentionally and temporarily to Respondent's adjacent job office half a mile away; there were no recordable injuries or illnesses.

5. On April 12 and 13, 1972, Respondent, acting through its construction foreman, permitted its employees at the said work site to work in a trench more than 5 feet deep and 8 or more feet long, the sides of which trench consisted of hard or compact soil and were not shored, sloped, braced, or otherwise supported, thereby violating the safety standard at 29 CFR 1926.652(c).

6. The construction foreman of Respondent, acting as management, knew the requirements of said safety standard and intentionally and purposely acted in violation of the standard, in utter disregard of its requirements.

7. A penalty of $10,000 for said willful violation is appropriate, considering the size of Respondent's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

CONCLUSIONS OF LAW

1. Respondent is and at all times pertinent herein was engaged in a business affecting commerce, and the Occupational Safety and Health Review Commission has jurisdiction over the

parties and the subject matter within the meaning of Sections 3 and 4(a) of the Occupational Safety and Health Act of 1970.

2. Respondent was not in violation of 29 CFR 1926.651(i) (1) on April 13, 1972.

3. Respondent was not in violation of 29 CFR 1904.2 on April 13, 1972.

4. Respondent wilfully violated Section 5(a) (2) of the Act on April 12 and 13, 1972, in its failure to comply with the safety standard at 29 CFR 1926.652(c).

5. A penalty of $10,000 for the said willful violation is appropriate, pursuant to Section 17(a) and 17(j) of the Act.

ORDER

IT IS ORDERED that the Citation for Willful Violation, as amended, be and the same hereby is AFFIRMED, and a penalty of $10,000 therefor is hereby assessed.

IT IS FURTHER ORDERED that Items 2 and 22 of the amended Citation for other than Serious Violations, and the penalties proposed therefor, be and the same are hereby VACATED.

s/ Abraham Gold
ABRAHAM GOLD
Judge, OSHRC

Dated: 29 JAN 1973
Washington, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-594

INTERCOUNTY CONSTRUCTION COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that under the civil penalty provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*)[1] a "willful" violation is one committed with evil intent to violate the law rather than, as

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[1]29 U.S.C. 654(a)(2) requires that every employer affecting interstate commerce "shall comply with occupational safety and health standards promulgated under this chapter." See also 29 U.S.C. 652(5). 29 C.F.R. 1926.652(c), the pertinent standard, provides:

> Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal.

29 U.S.C. 666(a) provides, in pertinent part:

> Any employer who willfully * * * violates the requirements of section 654 of this title, [or] any standard * * * or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation.

the court of appeals held, one reflecting either an intentional disregard of the Act or plain indifference to its requirements.

1. Petitioner is a construction company which specializes in underground construction. In April 1972, it was digging trenches and laying pipe for an interceptor sewer system in Arlington County, Virginia (Pet. App. 3a, 22a) One morning some of its employees were working at the bottom of a trench 10.7 feet deep and 40 feet long, which was not sloped, shored or otherwise protected against collapse (Pet. App. 3a, 10a, 25a; Tr. 108).[2] Pursuant to a telephoned complaint, the Occupational Safety and Health Administration, Department of Labor ("OSHA"), informed petitioner's president that the reported condition appeared to violate pertinent trenching regulations and might constitute danger to exposed employees. The president assured OSHA the condition would immediately be corrected, telephoned his job foreman that the trench did not comply with applicable regulations, and ordered the foreman to place a portable trench shield or "mule" in the trench (Pet. App. 3a, 12a, 28a; Tr. 27-29, 108, 273-274).[3]

The mule was lowered into the trench under the foreman's supervision, at about 11:30 a.m. that day. However, the foreman ordered it removed at 2 p.m. to install another pipe section, and he and two other employees thereafter worked at the trench bottom without protection against cave-ins (Pet. App. 3a, 25a-26a; Tr. 276-282). The next morning employees worked in the trench shovelling out mud which had accumulated during an overnight rainfall.

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[2]"Tr." refers to the transcript of proceedings before the Occupational Safety and Health Review Commission, which forms part of the appendix in the court of appeals.

[3]This particular mule was 20 feet long, 8 feet high and 8 feet wide. Although present at Intercounty's job site from the excavation's start, it was not used until OSHA responded to the employee complaint (Pet. App. 3a, 25a; Tr. 110-112, 124-127, 133, 273-274).

They also performed other operations at the trench bottom without being protected against collapse (Pet. App. 3a, 26a, 29a; Tr. 124, 282, 288-289).[4] The mule was replaced about two hours after work began, but employees continued intermittently to work outside its protection under the foreman's supervision (Pet. App. 12a, 30a; Tr. 283, 290-291).

It was undisputed that petitioner's safety director was familiar with OSHA trenching regulations and had instructed his foreman regarding their contents, that the job foreman also knew the regulations required the trench walls to be protected against collapse and knew the trench could have been stabilized by other means if use of the mule was infeasible (Pet. App. 4a-5a, 12a, 31a; Tr. 241, 245, 248-250, 297-298). Petitioner's defense to the willful violation charge was that the company thought it was in substantial compliance with the applicable regulations and that its foreman believed the trench safe despite those regulations (Pet. App. 4a-5a, 12a).

After a penalty citation by the Secretary of Labor imposing a $10,000 fine for the violation, and administrative review which upheld the citation but reduced the fine to $5,000,[5] the court of appeals affirmed (Pet. App. 1a-8a). It held that petitioner willfully violated the Act when its foreman with full knowledge of pertinent safety requirements removed the mule from the trench

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[4]In addition to normal shoring requirements, 29 C.F.R. 1926.651(d) provides that "after every rainstorm * * * the protection against slides * * * shall be increased if necessary."

[5]See Pet. App. 18a-35a, Decision and Order of Administrative Judge; Pet. App. 9a-17a, Decision of the Occupational Safety and Health Review Commission.

and permitted unprotected work to continue. The court rejected petitioner's contention that the penalty provisions cover only violations done with a deliberate intent to defy the Act, stating that "to require the Commission to find such a bad purpose * * * would place a severe restriction on the statutory authority of OSHA to apply the stronger sanctions in enforcing the law, a result * * * not * * * intended by Congress" (Pet. App. 6a). Instead it concluded "that willfulness is used in the mere cognitive sense [common] in civil statutes" (*ibid.*), and therefore willful action (Pet. App. 5a)—

> means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, "regardless of venial motive." * * * The facts here indicate such a conscious, deliberate decision. After the company was advised by OSHA that protective measures were necessary and had placed the "mule" in the trench to achieve compliance it intentionally removed the "mule" from the trench. Regardless of any good-faith belief that the work area remained safe the fact is that the company knowingly chose not to comply with the OSHA regulations and requirements. That decision was a willful action in violation of the law.

The court stated that the meaning of "willful" in a civil statute "would seem to have been answered" by *United States* v. *Illinois Central Railroad Co.*, 303 U.S. 239, 243, which held action willful when done by a person "who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements" (Pet. App. 7a).

2. The court of appeals correctly held that under the penalty provisons of the Act a violation is willful if committed

"knowledgeably by one subject to the statutory provisions in disregard of the action's legality," and that a deliberate intent to defy the Act is not required. That is the normal meaning of the term in regulatory statutes, which ordinarily do not even require "consciousness of wrongdoing" as an element of the offense (*United States* v. *Park*, 421 U.S. 658, 670-671; cf. *United States* v. *Illinois Central Railroad Co., supra; United States* v. *Bishop*, 412 U.S. 346, 361). There is no indication that Congress intended the concept to be more stringent in this Act.[6] To the contrary, as the court of appeals pointed out (Pet. App. 6a), "to require the Commission to find such a bad purpose * * * * would place a severe restriction on the statutory authority of OSHA to apply the stronger sanctions in enforcing the law."

The Fourth Circuit's decision accords with those of two other circuits that have recently considered the question. *F.X. Messina Construction Corp.* v. *Occupational Safety and Health Review Commission*, 505 F.2d 701 (C.A. 1); *United States* v. *Dye Construction Co.*, 510 F.2d 78 (C.A. 10). Petitioner argues (Pet. 9-10) that the decision conflicts with the Third Circuit's ruling in *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207, affirmed *en banc*, 519 F.2d 1215, petition for a writ of certiorari pending, No. 75-748, that

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[6]Petitioner's argument (Pet. 7-9) that "willful" must be defined restrictively lest it overlap with the definition of a "serious violation" (see 29 U.S.C. 666(a), (b), (j)) is not well taken. "Serious" violations are defined in terms of risk of serious injury, 29 U.S.C. 666(j). See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 518 F.2d 990, 1013 (C.A. 5). But cf. *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207, affirmed *en banc*, 519 F.2d 1215 (C.A. 3), petition for a writ of certiorari pending, No. 75-548. Willfulness, to the contrary, focuses on actual knowledge of a regulation — knowledge which must be proved as part of the Secretary's *prima facie* case.

The *en banc* proceedings and affirmance did not address the willfulness issue.

"[w]illfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting [flouting] of the Act." As applied to the facts of this case, however, there is no conflict. *Irey* involved a foreman's good-faith mistake of fact regarding the soil composition of a particular trench. If the foreman's mistaken assumption was correct the trench was not dangerous and no protection against collapse was necessary. 519 F.2d at 1206-1207. Even in that situation the Third Circuit did not hold that the conduct was not willful, but remanded the case to the agency. 519 F.2d at 1207, 1219.

In the present case, in contrast, there was no mistaken assumption of fact. The agency and the court of appeals both found that petitioner knew it was violating applicable regulations (Pet. App. 4a-8a). The conduct in the present case is thus significantly different from that in *Irey*, and there is no reason to think that the Third Circuit would disagree with the Fourth Circuit that petitioner's conduct here was willful.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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